LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
DEC 5 1952

No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE; THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE; GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
1. Unlawful detention	6
2. Coerced confessions	7
3. Denial of counsel of petitioners' choice, or effective assistance of counsel	9
4. Suppression of evidence	11
5. Perjured testimony	11
6. Trial in an atmosphere of terror	13
Argument	14
Conclusion	24
Appendix	25

CITATIONS

Cases:

Ahrens v. *Clark*, 335 U.S. 188	2
Burall v. *Johnston*, 134 F. 2d 614, certiorari denied, 319 U.S. 768	21-22
Carter v. *Woodring*, 92 F. 2d 544, certiorari denied, 302 U.S. 752	17
Close v. *United States*, 198 F. 2d 144, No. 130 Misc., O.T. 1952, certiorari denied November 13, 1952	22
Cobb v. *Hunter*, 167 F. 2d 888, certiorari denied, 335 U.S. 832	23
Coggins v. *O'Brien*, 188 F. 2d 130	16, 17, 20
Darr v. *Burford*, 339 U.S. 200	17, 19, 20, 24
Dynes v. *Hoover*, 20 How. 65	17
Frank v. *Mangum*, 237 U.S. 309	16, 24
French v. *Weeks*, 259 U.S. 326	20
Gault v. *Burford*, 173 F. 2d 813	16
Goodwin v. *Smyth*, 181 F. 2d 498	16
Grafton v. *United States*, 206 U.S. 333	18
Grimley, In re, 137 U.S. 147	18
Gusik v. *Schilder*, 340 U.S. 128	17
Hawk, Ex parte, 321 U.S. 114	16, 24
Hiatt v. *Brown*, 339 U.S. 103	18
Johnson v. *Eisentrager*, 339 U.S. 763	2
Kennedy, United States ex rel. v. *Tyler*, 269 U.S. 13	16, 24
McClaughrey v. *Deming*, 186 U.S. 49	18

Cases—Continued

	Page
Maoney v. Holohan, 294 U.S. 103	16, 23
Moore v. *Dempsey*, 261 U.S. 86	16, 17
Morton v. *Welch*, 162 F. 2d 840	22
Powers v. *United States*, 223 U.S. 303	22
Reaves v. *Ainsworth*, 219 U.S. 296	20
Schechtman v. *Foster*, 172 F. 2d 339, certiorari denied, 339 U.S. 924	16, 20, 24
Setser v. *Welch*, 159 F. 2d 703, certiorari denied, 331 U.S. 840	22
Smith v. *United States*, 187 F. 2d 192, certiorari denied, 341 U.S. 927	21
United States v. *Baldi*, 192 F. 2d 540, certiorari granted, 343 U.S. 903	16
United States v. *Burns*, 4 CMR (AF) 907	24
United States v. *Dennis*, 4 CMR (AF) 872	23, 24
United States v. *Freeman*, 167 F. 2d 786, certiorari denied, 335 U.S. 817	22
United States v. *Hiatt*, 141 F. 2d 664	20
United States v. *Klinger*, 136 F. 2d 677, certiorari denied, 320 U.S. 746	22
Valdez v. *United States*, 244 U.S. 432	23
Whelchel v. *McDonald*, 340 U.S. 122	24
Wild v. *Oklahoma*, 187 F. 2d 409	23
Wilson v. *United States*, 162 U.S. 613	22

Constitution and Statutes:

United States Constitution, Art. 1, § 8, cl. 14	18
Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627:	
Art. 47 [10 U.S.C., Supp. II, 1518(c)]	25
Art. 48 [10 U.S.C., Supp. II, 1519]	25
Art. 49 [10 U.S.C., Supp. II, 1520]	26
Art. 50 [10 U.S.C., Supp. II, 1521]	26
Art. 53 [10 U.S.C., Supp. II, 1525]	28
Art. 92 [10 U.S.C., Supp. II, 1564]	29
United States Code:	
28 U.S.C. 2255	21
50 U.S.C., Supp. V, §§ 576-660 64 Stat. 113-132 (formerly 10 U.S.C. 1474-1525, 41 Stat. 788-800)	18
50 U.S.C., Supp V, § 663, 64 Stat. 132 (formerly 10 U.S.C. § 1522, 41 Stat. 797, as amended 50 Stat. 724, 56 Stat. 732)	18

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 422

ROBERT W. BURNS AND HERMAN P. DENNIS, JR., PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE; THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE; GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the District Court are reported at 104 F. Supp. 310 and 312 (R. 18-20). The majority and dissenting opinions of the Court of Appeals (R. 21-44, 44-56) are as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and amended on August 25, 1952 (R. 58). The petition for a writ of certiorari was filed on October 29, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on petitions for habeas corpus alleging violations of due process in court-martial proceedings, petitioners were entitled to a hearing on factual issues which had been examined and found groundless in the military appellate processes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 25-29.

STATEMENT

Petitioners, citizen members of the United States Armed Forces, seek review of the judgment of the court below, which affirmed the orders of the United States District Court for the District of Columbia dismissing, without hearing, their several petitions for writs of habeas corpus against respondents (R. 1-5, 9-15); under whose authority petitioners are in custody of Headquarters, Japan Logistical Command, APO 503, awaiting execution of death sentences imposed by courts-martial following conviction for rape and murder.[1] They contended in their

[1] Petitioners, although outside the territorial jurisdiction of any federal court, seem to have "standing to invoke the process of federal courts somewhere." *Johnson* v. *Eisentrager*, 339 U.S. 763, 790; compare *Ahrens* v. *Clark*, 335 U.S. 188

respective habeas corpus petitions that their detention was unlawful because the courts-martial, having denied them due process as a result of certain alleged irregularities in the conduct of their trials, had lost jurisdiction over them.

From the habeas corpus petitions and the responses to rules to show cause the following facts appear:

On December 11, 1948, petitioners Burns and Dennis were serving as Staff Sergeant and Private, respectively, in the United States Air Force, assigned to the 12th Air Ammunition Squadron at Guam, Marianas Islands (R. 1, 9, 18). On February 1, 1949, Dennis was charged with a violation of the 92nd Article of War, in two specifications, as amended on April 14, 1949, alleging, respectively, that on December 11, 1948, on the Island of Guam, he did rape and "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill" one Ruth Farnsworth, "by grievously beating, tearing, and abusing her person" (R. 11, 16; ACM 1892, Dennis (BR), 4 CMR (AF) 872, 873-874; Resp. Ex. C).[2] The same charge and specifications were filed against Burns on February 20, 1949 (R. 3, 6-7; ACM 1893; Burns (BR), 4 CMR (AF) 907, 909; Resp. Ex. C).[3] Dennis was tried by general court-martial, duly convened at Headquarters, Twentieth Air Force, Guam, from 9th to

[2] The citation refers to volume 4 of the Court Martial Reports of the Judge Advocate General of the Air Force, hereinafter referred to as CMR (AF).

[3] Same as fn. 2, *supra*.

16th of May, 1949 (R. 16, 18; 4 CMR (AF) 872, 873; Resp. Ex. C). Burns was tried by general court-martial, composed of different officers, duly convened at Headquarters, 19th Bombardment Wing, Medium, Guam, from 27th to 30th of May, 1949 (R. 6, 18; 4 CMR (AF) 907, 909; Resp. Ex. C). They were both found guilty of the offenses charged and sentenced to death (R. 1, 7, 9, 16, 18; 4 CMR (AF) 872, 874, 907, 909; Resp. Ex. C).

The trial proceeding in each instance was approved, following a review in accordance with provisions of AW 47, by the Staff Judge Advocate of the convening authority, the Twentieth Air Force, which then forwarded the trial records to The Judge Advocate General, United States Air Force, at Washington, for appellate review pursuant to provisions of AW 50 (R. 1-2, 7, 9-10, 16, 18-19; Resp. Exs. A, B). On November 21, 1949, the Board of Review, in the office of The Judge Advocate General, after a review of Dennis' court martial proceedings following the submission of a brief and oral argument by one of his present counsel, found that "no error injuriously affecting the substantial rights of the accused was committed during the trial" and approved it (R. 16-17, 18-19; Resp. Ex. C; 4 CMR (AF) 872, 904; Resp. Ex. C). After a similar submission of a brief and oral argument on behalf of Burns by one of his present counsel, a Board of Review, consisting of different members, affirmed his court-martial proceedings on March 14, 1950 (R. 7, 18-19; Resp. Ex. C; 4 CMR (AF) 907, 923). The Judicial Council, in the office of The

Judge Advocate General, after the submission of separate briefs and oral arguments on behalf of each petitioner by one of their present counsel to the effect "that the conviction should not be permitted to stand because the record shows violation of" their "fundamental individual rights," approved all prior proceedings against Dennis and Burns on July 18, and August 18, 1950, respectively (R. 17, 7; Resp. Ex. D; 4 CMR (AF) 888, 892, 904, 923, 926, 927).

Subsequently, in view of a series of correspondence on behalf of petitioners, containing "allegations which if true would reflect adversely upon the fundamental fairness of" their trials, and because of the gravity of the sentences, The Judge Advocate General, United States Air Force, in his "capacity as supervisor of the administration of military justice generally," had "requested the Office of Special Investigations, Office of The Inspector General, to make a complete investigation of these matters" (R. 17-18; Resp. Ex. E; 4 CMR (AF) 905-906, 928-929). Later, in transmitting pursuant to provisions of AW 50(d)(1) the records of the appellate review accorded petitioners to the Secretary of the Air Force, The Judge Advocate General reported that "the most comprehensive investigation of the Office of Special Investigations disclosed nothing which would warrant my recommending disapproval of the sentence" of either petitioner (Resp. Ex. E; 4 CMR (AF) 906, 929).[4] On August

[4] The reports of the independent investigation were also forwarded to the Secretary of the Air Force (4 CMR (AF) 929).

3, 1951, the President of the United States confirmed petitioners' sentences and ordered their execution by the Commanding General, Far East Air Force (R. 8, 17, 18-19; Resp. Ex. F; 4 CMR (AF) 907, 930). Thereafter, petitioners, pursuant to provisions of 50 U.S.C., Supp. V, 660 (formerly AW 53), filed with the Judge Advocate General their petitions for a new trial which contained essentially the same allegations presented in their respective petitions for habeas corpus (R. 8, 17, 19, 2, 10; Resp. Ex. G). The Judge Advocate General appointed a board of officers, who heard the arguments of petitioners' counsel, and considered all the evidence presented (Resp. Ex. G). On January 28, 1952, the Judge Advocate General, after considering the memoranda of the board of officers and after reexamining petitioners' entire trial records and the independent investigations conducted at his request as against the allegations set forth in their petitions, denied petitioners' requests for a new trial (R. 8, 17-18; Resp. Ex. G).

Specifically, the petitions for habeas corpus raised the following issues which were disposed of by the various military reviewing authorities as indicated:

1. *Unlawful detention.* Petitioners alleged that on January 7, 1949, upon their arrest by military authorities, they were placed in custody of civil authorities on Guam, where, without arraignment, they were held, incommunicado, not allowed to consult with counsel, "subjected to continuous ques-

tioning, beaten, denied sleep and edible food," in violation of the Penal Code of Guam and the United States Constitution, until their return to the custody of the Air Force several weeks later (R. 2-3, 10-11, 13). During such detention Dennis, "without being advised of his constitutional rights against self-incrimination had taken from his person certain pubic hairs which were subsequently used as evidence against him" (R. 12).

The Judge Advocate General concurred in the findings of the Judicial Council that at the time of their arrest petitioners were "not deprived of any right to a preliminary hearing before a committing magistrate or other like authority", because Guam at that time was under control of "a military government deriving its authority from the United States and administered by the Department of the Navy. * * * Chapter 35, 'Civil Regulations With the Force and Effect of Law in Guam' (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847-849, Penal Code of Guam, which is applicable to other offenders" (4 CMR (AF) 888, 900; Resp. Exs. D, G).

2. *Coerced confessions:* Petitioners alleged that, as a "result of physical duress, protracted interrogation, the use of a lie detector, threats" and promises, and without being advised of his rights against self-incrimination, Dennis gave four confessions, which also implicated Burns (R. 11, 12, 13).

The facts set forth in the record of the trial do not show that Dennis, while in custody of the Guam authorities, suffered undue hardships or privations or that there was "any calculated endeavor on the part of officials to secure a confession through the pressure of unrelenting questioning" (4 CMR (AF) 885; Resp. Ex. C). The four statements made by Dennis while he was detained by the Guam authorities were received in evidence against him, only "after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him", together with testimony showing that he was warned of his constitutional rights (Resp. Exs. G, p. 8, C, D, 4 CMR (AF) 880-882, 885-886, 887, 889-892, 895-900). The evidence at the trial showed that after Dennis had signed his third confession, he re-enacted his part in the crime, pointing out to the investigators the exact route taken in the course of the crime, depicting the roles played by the participants together with all the details, which coincided in all major respects "to the facts and circumstances evidenced" by other testimony (4 CMR (AF) 880, 887; Resp. Exs. C, G).

Although petitioners together with other soldiers had voluntarily submitted to a "lie detector" test prior to their arrest, no confessions were made while they were undergoing such tests, nor were the results of the tests used in evidence (4 CMR (AF) 885; Resp. Ex. C).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel:* Petitioners alleged that counsel furnished Burns "had only one day to prepare his defense, thereby depriving petitioner of his right to effective counsel" (R. 4); and that Dennis was denied a "request for counsel of his choice," and the counsel furnished him "did not take adequate time to prepare" his defense (R. 12).

The record shows that prior to trial, petitioners were notified that Dennis' written request for the services of Lieutenant Colonel Daly as individual defense counsel could not be granted because by decision of the appointing authority "Lieutenant Colonel Daly was declared not available for such duty," and Colonel Daly himself advised Dennis that he could not "conscientiously defend" him (4CMR (AF) 883, 893; Resp. Exs. C, D). Thereafter, Dennis "signified his satisfaction with the regularly appointed defense counsel and stated that he did not desire the services of Lieutenant Colonel Daly" (*id.*). However, at the beginning of the trial, Dennis stated, "I desire the regularly appointed defense counsel but do wish to have Lieutenant Colonel Edward F. Daly to assist" (4CMR (AF) 882; Resp. Ex. C). The law member of the court "ruled that Lieutenant Colonel Daly was not available to serve as special defense" (4CMR (AF) 883; Resp. Ex. C). The Board of Review in examining Dennis' trial record found that the "official files of the Air Force available at Headquarters, USAF", showed "that at the time of trial the officer requested by the accused as individual defense

counsel was himself under charges involving misconduct, moral turpitude, drunkenness and disorderliness and the corrupt endeavor to obstruct and impede military justice *in the instant case and others allied therewith* and the unethical offer to abandon and withdraw from the defense of this accused and others provided he would be granted immunity from punishment for alleged prior acts of his own misconduct" (4 CMR (AF) 884, 892-895, 906; Resp. Exs. C, D, E, G). On the date of the trial, Daly's resignation from the service "was in the processes of military administration," since on April 19, 1949, he had tendered such resignation "for the good of the service, in lieu of trial by court-martial" on the various charges pending against him (*id.*).

"The record of trial reveals that" Dennis "was defended ably and vigorously by the regularly appointed defense counsel, all three of whom were qualified attorneys, admitted to the practice of law in their respective states and designated as judge advocates by the Chief of Staff, United States Air Force", and that they participated in the case since their assignment without knowledge that Dennis was willing to obtain Colonel Daly as special counsel after the original information to Dennis that Daly was unavailable for the requested assignment (4 CMR (AF), 884, 893-894; Resp. Exs. C, D).

As to Burns, the record indicates that he "was defended at the trial by counsel of his choice" (4 CMR (AF) 921-922; Resp. Ex. C). On the day of his trial, Burns, though present with his "regularly

appointed defense counsel", was granted a request to be represented by an officer of his own choosing, Captain Drucker, a member of the Judge Advocate's Corps and a qualified lawyer, as his individual counsel, while retaining two of the three regularly appointed defense counsel "to act as associate counsel" (4 CMR (AF) 921; Resp. Ex. C). Burns then stated that he was "satisfied" with such counsel. Neither he nor counsel of his choice requested a continuance of his trial (4CMR (AF) 921; Resp. Exs. C, G).

4. *Suppression of evidence:* Petitioners alleged that certain "important evidence tending to show" petitioners' innocence was suppressed by the prosecution (R. 4, 12).

The Judge Advocate General, in rejecting, as a ground for a new trial, the contention, "that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court," stated that "this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless" (Resp. Ex. G, p. 13).

5. *Perjured testimony:* Petitioners alleged that Calvin Dennis, who was also charged with the same offenses as petitioners, admitted in a sworn statement that his testimony at the trial, which alone directly connected Burns with the crimes charged, was perjured as a result of "threats and promises of special consideration if Calvin

Dennis agreed to testify against" Burns (R. 4, 3); that the prosecution "sought to procure witnesses to perjure themselves" against petitioner Dennis, "and intimidated and threatened those who sought to help" him (R. 12); that the trial record shows that specimens of hair obtained from Dennis "were deliberately planted in an effort to create evidence tending to show his guilt" (R. 13).

In view of the trial record and circumstances surrounding the case, The Judge Advocate General found that he could not place any credence in Calvin Dennis' affidavits repudiating his testimony given against Burns at the latter's trial (Resp. Ex. G.). The Judicial Council found that "the record discloses that the trial judge advocate and the law member used commendable care to assure that Private Calvin Dennis appeared as a witness voluntarily and that there was present no coercive influence which would cause him to tell other than the truth", and that their interrogation shows "conclusively that Private Calvin Dennis offered himself as a witness freely and voluntarily and that his testimony was given with a full and complete understanding of his rights, uninfluenced and uncolored by any threat or promise" (4 CMR (AF) 926, 921-922; Resp. Exs. C, D). During his repeated assertions that he was testifying voluntarily, Calvin Dennis "sustained himself through a searching cross-examination" by the defense (Resp. Ex. G, p. 8). The defense made an attack on the credibility of his testimony "by showing that he had made prior inconsistent statements," but he

explained "that those statements were influenced by threats made" by petitioners. The record shows that "Calvin Dennis' testimony was consistent in every respect with the corroborative evidence". (4 CMR (AF) 915-916; Resp. Ex. C.).

With respect to the assertions that the prosecution "intimidated and threatened those who sought to help" him, the Judge Advocate General found that "exhaustive" independent investigations did not substantiate such allegations (Resp. Ex. G).

6. *Trial in an atmosphere of terror*: Petitioners alleged that their trials were "conducted in an atmosphere of terror, hysteria and vengeance" (R. 4, 12-13).

The Board of Review, in reviewing Burns' record, found that the atmosphere on Guam was not such as to preclude a fair and impartial trial (4 CMR (AF) 922; Resp. Ex. C). "All members of the court were from organizations located at distant points from the Island of Guam" (*id.*). Burns' counsel cross-examined several of the members of the court to determine whether they possessed any preconceived opinion as to Burns' guilt or innocence, and declined to challenge any member for cause (*id.*).

The District Court, without affording petitioners a hearing, upon motions by respondents, dismissed the petitions for writs of habeas corpus, on the ground that they did "not state facts upon which the relief sought can be granted," because "The record here shows that extensive consideration was given to each of the matters asserted in support of

the relief sought in these proceedings, and the various military authorities who were charged with the responsibility of review determined such matters to be factually groundless" (R. 19-20).

On appeal, the Court of Appeals for the District of Columbia affirmed the judgments of the District Court (R. 57-58). It stated that, in accordance with its "frequent practice in capital cases," it had examined "the whole" of petitioners' long records, but concluded, "in agreement with the District Court, that the facts alleged in the petitions, viewed in the light of the return to the rule, do not supply grounds upon which the relief sought can be granted" (R. 43).

ARGUMENT

We submit that petitioners' extensive argument (Pet. 6-11) concerning the power of federal courts to correct, in habeas corpus proceedings, violations of the due process guarantees in court-martial proceedings, is not directly relevant to the issue involved herein. The decisions of the lower courts did not reject that proposition of petitioners. The district court denied petitioners' respective applications for writs of habeas corpus solely on the ground that they did "not state facts upon which the relief sought can be granted," because the pleadings showed that "the various military authorities who were charged with the responsibility of review," after having afforded them adequate opportunity to prove the very matters asserted in their habeas corpus petitions, "determined such

matters to be factually groundless" (R. 20). And the court below, in affirming the judgments of the district court, specifically recognized that the due process requirement of the Fifth Amendment is applicable to court-martial proceedings, which civil courts will reexamine, in a proper case, to determine whether the constitutional requirement had been met (R. 31). Thus, the only issue which confronted the court below involved "a problem of jurisdiction," raised by the question, "whether the allegations of the petitions, viewed in the light of the accompanying data and of the returns to the rules, are sufficient to invoke the jurisdiction of the court and to require a hearing on the merits" (R. 23).

Petitioners contend (Pet. 11-24), in effect, that they have an absolute right to such a hearing in a civil court, irrespective of the fact that, having availed themselves of the appellate machinery of the military authority for corrective action consistent with the constitutional due process requirement, they had failed to vindicate their constitutional claims. This contention is untenable. The court below correctly held that the general principles governing the reviewability by habeas corpus of state-court judgments are also applicable to such reviews of judgments of courts-martial. It is well established, generally, that where a petitioner has exhausted his remedies in a state court, wherein his constitutional questions had been considered and adjudicated on the merits, the federal court, ordinarily, will not re-examine upon a writ of habeas

corpus the questions thus adjudicated, unless under its peculiar organization, the state tribunal was unable to afford a constitutionally adequate process for relief, or some "exceptional circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U.S. 114, 117; *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17; *Coggins* v. *O'Brien*, 188 F. 2d 130, 133 (C.A. 1); *Goodwin* v. *Smyth*, 181 F. 2d 498 (C.A. 4); *Gault* v. *Burford*, 173 F. 2d 813 (C.A. 10); *Schechtman* v. *Foster*, 172 F. 2d 339 (C.A. 2), certiorari denied, 339 U.S. 924; cf. *Mooney* v. *Holohan*, 294 U.S. 103; *Moore* v. *Dempsey*, 261 U.S. 86, 91, 92.[5] Thus, if the corrective process of a non-federal tribunal is shown to be adequate for the protection of one's fundamental human rights and such protection had been accorded an accused in consonance with the constitutional due process requirement, federal courts will not interfere by habeas corpus. See *Moore* v. *Dempsey, supra;* see also *Frank* v. *Mangum*, 237 U.S. 309. This rule is predicated, primarily, upon

---

[5] Petitioners' contention (Pet. 19-21) that the application of this doctrine by the court below is not only in conflict with the decision in *United States* v. *Baldi*, 192 F. 2d 540, 544 (C.A. 3), certiorari granted, 343 U.S. 903, but with *Moore* v. *Dempsey*, 261 U.S. 86, is unfounded. The doctrine that a federal court in a habeas corpus proceeding involving an attack on a judgment of a state court could adopt the findings of the latter on the issues presented was not disputed in the *Baldi* case. There the court stated that the mere fact that matters averred in a federal petition for habeas corpus had "been decided on the merits by the highest state court is a fact to be given weight by a district court in passing upon petitions for habeas corpus. But that fact does not relieve the federal court of the duty to pass upon the merits of the petition" (192 F. 2d at 544). However, it is possible "to pass upon the merits of a petition" without a hearing thereon. Thus, what the court meant in the

the "respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours." *Coggins* v. *O'Brien,* 188 F. 2d 130, 133 (C.A. 1); see *Darr* v. *Burford,* 339 U.S. 200, 205. For this reason, petitioners would limit the applicability of the rule to judgments of state courts (Pet. 22). But the desirability of preserving the historical and constitutional separation of the civil and military powers is at least as good a reason for holding the rule applicable to habeas corpus proceedings involving judgments of military tribunals. See *Gusik* v. *Schilder,* 340 U.S. 128, 131-132. The courts-martial and the judicial powers of the United States, although deriving their respective authority from the Constitution, are, nevertheless, independent of each other. *Dynes* v. *Hoover,* 20 How. 65; *Carter* v. *Woodring,* 92 F. 2d 544 (C.A. D.C.), certiorari denied, 302 U.S. 752. The courts-martial are established under the constitutional

---

Baldi case was that a federal court could not arbitrarily deny a habeas corpus petition merely because the issues raised therein had been adjudicated by a state court, but that it could adopt the findings of the state court and consider them against the allegations of the petition, which could be done without a hearing, as it was in the instant case.

In *Moore* v. *Dempsey, supra,* the record showed that the existing corrective process of the state was inadequate to correct the alleged wrongs, because mob hysteria had permeated not only the trial procedure but the entire state judicial system, including its appellate processes, as well as the executive branch of the government, so that the federal court could not in good faith adopt the findings of the state court. Under the circumstances in that case, it was the duty of the federal court to hold a hearing in order, as this Court stated, to "find whether the facts alleged are true and whether they can be explained so far as to leave the state proceeding undisturbed" (261 U.S. at 92).

power of Congress "To make Rules for the Government and Regulation of the" armed forces of the United States. U. S. Constitution, Art. 1, § 8, cl. 14. Under this specific grant of power, Congress has provided for trial and appellate procedures, including process for new trial, with respect to military offenses. 50 U.S.C. §§ 576-660, 64 Stat. 113-132 (formerly 10 U.S.C. §§ 1474-1525, 41 Stat. 788-800). As stated in *Grafton v. United States*, 206 U.S. 333, 347-448, "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers * * *." See *Hiatt v. Brown*, 339 U.S. 103, 110; *In re Grimley*, 137 U.S. 147. Although it has been held in *McClaughry v. Deming*, 186 U.S. 49, 63, that courts-martial are of special and limited jurisdiction, their judgments, when affirmed by the required reviewing authority, are nevertheless "final and conclusive," just as those of any state court, and hence "binding upon all departments, courts, agencies, and officers of the United States," subject only to review upon collateral attack in habeas corpus. 50 U.S.C. § 663, 64 Stat. 132 (formerly 10 U.S.C. § 1522, 41 Stat. 797, as amended 50 Stat. 724, 56 Stat. 732). Thus, there is no valid reason why the doctrines governing the reviewability by habeas corpus in federal

courts of judgments of state courts should be inapplicable to similar reviews of judgments of courts-martial.

The difference in degree of appellate review available to a person collaterally attacking a judgment of a state tribunal and to one similarly challenging a judgment of a military court is not substantial enough, as petitioners think (Pet. 22-23), to warrant the denial of the applicability of the general rule to judgments of courts-martial. The fact that a person in state custody has opportunity, which is unavailable to one in military custody, for review of his conviction by this Court prior to petitioning a federal District Court for a writ of habeas corpus, since the latter process is contingent upon exhaustion of the former, does not create any disparity in appellate opportunities tantamount to a denial of any fundamental rights. In fact, one applying for federal habeas corpus to review a judgment of a state court is not necessarily assured of an additional hearing on the merits, for if this Court denies him certiorari, the District Court will on that ground, as a rule, deny his petition for habeas corpus without a hearing, even though the fact of refusal of certiorari has not resolved any issues on the merits. Cf. *Darr* v. *Burford*, 339 U. S. 200, 215-216. As the court below pointed out (R. 30), "due process of law is not a fixed formula of unchanging and unchangeable elements. Due process of law in the armed forces has always been in some respects different from due process under civil authority. 'To those in the military or naval

services of the United States the military law is due process'," citing *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3).

Nor is the danger of command influence upon courts-martial so great as to make military justice continually suspect of unfairness, as petitioners seem to imply (Pet. 22-23), and hence invariably subject to review by civil courts. If the military reviewing authority itself was so biased as to be constitutionally inadequate to redress, in accordance with due process, the wrongs complained of, it was incumbent upon petitioners so to allege in their petitions for habeas corpus, and to sustain the burden of proof in that respect. *Darr* v. *Burford*, 339 U. S. 200, 218; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *Scheckman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924. This they have not done. They have not alleged any irregularities in the military appellate processes invoked by them.[6]

[6] Petitioners' claim (Pet. 23) that military appellate procedure did not measure up to civil standards, because, upon a motion for new trial "to the Judge Advocate General, no hearing is held to permit a petitioner to prove his allegations, no counter-affidavits are submitted; the Judge Advocate General investigates the charges, satisfies himself as to the substance of the allegations, and there is no appeal from his decision", is not supported by the record. Throughout the appellate procedure, petitioners were represented by counsel who was heard on their behalf; they had submitted affidavits and other documents, containing the same allegations as the instruments filed with their habeas corpus petitions, to the Judge Advocate General, who not only previously had the same matters investigated by the Inspector General's Office, but had a special board of officers re-examine the same matters after hearing petitioners' counsel, before denying their requests for a new trial.

We submit that applying the doctrine that a federal court, in the absence of "exceptional circumstances of peculiar urgency," will not relitigate, in a habeas corpus proceeding, matters adjudicated, in accordance with due process, in a non-federal tribunal, the courts below correctly held, without a hearing, that on the pleadings, which contained the detailed findings of the constitutionally authorized military reviewing authorities, there were no grounds upon which the requested relief could be granted. The documents submitted by respondents disproved all of petitioners' allegations.

Actually, as shown hereafter, the allegations of the petitions for habeas corpus, when considered in the light of the specific facts offered in support thereof, do not raise issues which would afford a basis for collateral attack even on a judgment of conviction of a federal court.

1. The admissibility of the confession was an issue thoroughly explored at the trial and on review. As the court below pointed out (R. 36), "Upon the face of the papers presented by the petitioner the issue was, in the light most favorable to him, clearly debatable, and there was substantial evidence in support of the conclusion" against his allegations. An objection to the admissibility of evidence, even on constitutional grounds, does not support a collateral attack on criminal judgments by either habeas corpus or a motion under 28 U. S. C. 2255. *Smith* v. *United States*, 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S.

927; *Burall* v. *Johnston*, 134 F. 2d 614 (C. A. 9), certiorari denied, 319 U. S. 768.[7]

2. The allegations of denial of the right to counsel are so clearly contradicted by the admitted facts as not to raise an issue which would require a hearing. Cf. *Close* v. *United States*, 198 F. 2d 144 (C.A. 4), No. 130 Misc., O. T. 1952, certiorari denied, November 13, 1952. The record clearly shows that the Commanding General did not abuse his discretion in declaring Colonel Daly "not available" as defense counsel (see pp. 9-10, *supra*). Petitioners themselves stated at the trial that they were "satisfied" with their counsel. Burns cannot complain of his deliberately selected counsel, nor can such counsel be said to have had insufficient time to prepare a defense in view of the fact that he did not request an adjournment and in view of the fact that assistant defense counsel were thoroughly familiar with the case. Cf. *Morton* v. *Welch*, 162 F. 2d 840 (C. A. 4); *Setser* v. *Welch*, 159 F. 2d 703 (C. A. 4), certiorari denied, 331 U. S. 840.

3. With respect to petitioners' allegations that important evidence was suppressed by the prosecution, the court below pointed out that Colonel Daly, who has submitted an affidavit in support of petitioners' allegations, although appear-

[7] The failure, if any, to advise Dennis of his constitutional privilege against self-incrimination, did not render the hair inadmissible in evidence. *Powers* v. *United States*, 223 U.S. 303, 314; *Wilson* v. *United States*, 162 U.S. 613, 623; *United States* v. *Freeman*, 167 F. 2d 786, 790-791 (C.A. 7), certiorari denied, 335 U.S. 817; *United States* v. *Klinger*, 136 F. 2d 677, 678 (C.A. 2), certiorari denied, 320 U.S. 746.

ing as a witness at their trials "made no mention of the dog-tags or the Navy uniform." Furthermore, his "affidavit does not show that the prosecutors knew of such items or that Colonel Daly ever called them to the attention of counsel either for the prosecution or for the defense." (R. 38.) Thus, side from the fact that, on petitioners' motion for a new trial, the Judge Advocate General, after an exhaustive independent investigation, found the charges "baseless," petitioners allege no such misconduct by the prosecution as would bring the cause within the scope of *Mooney* v. *Holohan*, 294 U. S. 103.[8]

4. The retraction by Calvin Dennis would not be a sufficient basis for a new trial in a criminal case, much less a basis for collateral attack. *Wild* v. *Oklahoma*, 187 F. 2d 409 (C. A. 10); cf. *Valdez* v. *United States*, 244 U. S. 432; *Cobb* v. *Hunter*, 167 F. 2d 888, (C. A. 10), certiorari denied, 335 U. S. 832. The record shows that Burns had vigorously attacked the credibility of Calvin Dennis at the trial, so that the present effort is merely an attempt to relitigate decided issues.

5. Petitioners allege no facts to support their contention "that the atmosphere surrounding the trial was one of hysteria and terror" (R. 13). As the court below found "every relevant fact is to the contrary" (R. 40).

---

[8] The allegations as to attempted subornation of perjury by the prosecuting investigators, if true, could not in any way have injured petitioners since no evidence alleged by them to be perjured was used against them. See *United States* v. *Dennis*, 4 CMR (AF) 872, 906. Their allegations that specimens of Dennis' hair was "planted" as evidence against him, are unsupported.

Petitioners were given full opportunity to, and did, tender before the military appellate authorities exactly the same issues raised in their habeas corpus petitions. *United States* v. *Dennis*, 4 CMR (AF) 872, 888, 904-907; *United States* v. *Burns*; 4 CMR (AF) 907, 923, 927-930. Petitioners do not claim that the appellate authorities failed fully and fairly to consider all of their evidence relative to the constitutional issues, or in any way denied them due process in the course of their appeals. Petitioners have been accorded their full measure of constitutional rights and cannot relitigate on collateral attack issues fairly decided against them on the basis of substantial evidence. *Whelchel* v. *McDonald*, 340 U. S. 122; *Darr* v. *Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114; *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13; *Frank* v. *Mangum*, 237 U. S. 309; *Schechtman* v. *Foster*, 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

DECEMBER 1952.

APPENDIX

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 47 [10 U.S.C., Supp. II, 1518(c)].
> *Action on record of trial.*
>
> Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.
>
> Art. 48 [10 U.S.C., Supp. II, 1519].
> *Confirmation.*
>
> In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:
>
> a. By the President with respect to any sentence—(1) of death, * * *

Art. 49 [10 U.S.C., Supp. II, 1520].
Powers incident to power to confirm.

The power to confirm the sentence of a court-martial shall be held to include—

a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense:

b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

d. The power to order the sentence to be carried into execution;

e. The power to remand the case for a rehearing under the provisions of article 52.

Art. 50 [10 U.S.C., Supp. II, 1521].

(a) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit

its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

* * * * *

(h) *Finality of court-martial judgments.*

The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as re-

quired by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

Art. 53 [10 U.S.C., Supp. II, 1525].
Petition for new trial.

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all pro-

ceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Art. 92 [10 USC., Supp. II, 1564].
Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided,* That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952 232647 780